

REC'D AUG 16 2017

Name: Edward William Shepherd**JUDICIAL SELECTION COMMISSION****Application for Judicial Vacancy on the New Mexico Court of Appeals****APPLICATION****PERSONAL**

1. Full Name	Edward (Ned) William Shepherd			
2. County of Residence	Bernalillo			
3. Birthplace	Albuquerque, New Mexico			
4. If born outside the US, give the basis for your citizenship				
5. Birth Date	September 8, [REDACTED]			
6. Marital Status	Married - Thirty-Seven (37) Years			
7. If married, list spouse's full name	Denise Barela-Shepherd			
8. Spouse's occupation	Attorney/District Court Judge			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: As noted above, my wife is a Judge in the Second Judicial District. It would be necessary for me to not have any input or responsibility for cases involving my wife's court.				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
2002	6216 Fringe Sage Ct NE	Albuquerque	NM	87111

**EDUCATION**

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Sandia High School - 1974
College(s)	University of Albuquerque - 1975 - 1978. A.S. Police Science; B.S. Criminology University of New Mexico - 1978 - 1979 - Worked on and almost completed Master's degree in Public Administration.
Law School(s)	Texas Tech University - 1979 - 1972

12. Bar Admissions and Dates	New Mexico - 1982
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**EMPLOYMENT**

13. List Your Present Employment	
Date(s) of Employment	1/1/1985 to Present
Employer	Allen, Shepherd, Lewis & Syra, P.A.,

Mailing Address	4801 Lang Ave NE, Suite 200, Albuquerque, NM 87109
Business Phone	505-341-0110
Position	Shareholder
Duties	Case Management, Supervision and Training of Associates, Client Development, Junior Partner Training Development and Firm Management.
Supervisor	N/A
<b>14. List Your Previous Employment (beginning with most recent)</b>	
Dates of Employment	9/1/1982 to 12/31/1984
Employer	Rodey, Dickason, Sloan, Akin, & Robb, P.A.
Mailing Address	201 Third Street NW, Suite 2200, Albuquerque, NM 87102
Business Phone	505-765-5900
Business FAX	505-768-7395
Employer's Email Address	
Position	Associate Attorney

**Note:** No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

#### **PARTNERS AND ASSOCIATES**

##### **15. List all partners and associates, beginning with the current or most recent:**

Answer 15:

##### **Current Partners:**

Daniel W. Lewis; Kimberly A. Syra; Christopher R. Reed; Aaron R. Kugler, and Christopher P. Winters.

##### **Former Partners:**

Ben M. Allen; Stan Hatch; Rick Beitler; Kit Horan; Lynn Sharp; Jerry Dixon; Marcia Lubar; Rob Doughty; Terry Yenson; Donna Chapman; Nicole Charlebois and Joshua Conaway

##### **Associates:**

After thirty-five (35) years of practice in this firm I am unable to name all of the associates who have worked at our firm. I am including a listing of those who we have records as having been employed with the firm.

#### **EXPERIENCE**

##### **16. How extensive is your experience in Personal Injury Law?**

Answer 16: I have extensive experience in Personal Injury Law. That has been approximately 50 to 60% of my practice for the last thirty-five (35) years.

##### **17. How extensive is your experience in Commercial Law?**

Answer 17: I have limited experience in Commercial Law. The work I have done in Commercial Law involves issues that arise in the context of insurance litigation. For instance, I am currently in litigation involving the purchase of property that is now a small subdivision and there is a dispute over the contract and various agreements between the Purchaser and Seller.

**18. How extensive is your experience in Domestic Relations Law?**

Answer 18: None.

**19. How extensive is your experience in Juvenile Law?**

Answer 19: None.

**20. How extensive is your experience in Criminal Law?**

Answer 20: I have limited experience in Criminal Law. I spent four (4) years as a contract City Attorney in Rio Rancho, New Mexico charged with the responsibility to prosecute misdemeanors in Rio Rancho Municipal Court and appeals in District Court in Sandoval County. I did this while employed at Rodey, Dickason, Sloan, Akin, & Robb, P.A., and my current Firm. I spent approximately 30% of my time handling these cases. Since that time, my experience has been limited to what I have learned listening to my wife who did criminal work for approximately seventeen (17) years. She would discuss various legal issues in cases she was handling.

**21. How extensive is your experience in Appellate Law?**

Answer 21: My experience in Appellate Law is limited to appeals in cases I have handled. I have probably averaged involvement in 1-2 appeals every two (2) years over the course of my career.

**22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.**

Answer 22: My last trial was Wilson v. Tiku before Judge Singleton in August, 2015. I have done approximately 30 to 50 jury trials. I have not keep a list, although I was able to reconstruct from memory enough cases to be nominated for the American Board of Trial Advocates and inducted as a member. This organization requires a significant number of jury trials as well as recommendation from peers and adversaries.

**23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.**

Answer 23: I have tried approximately 100 non-jury trials. Most of these have involved the prosecution of misdemeanor offenses mentioned above as well as Workers' Compensation. For the first 15 years of my career I had an extensive Workers' Compensation practice. I have not had a non-jury trial within the last two (2) years.

**24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.**

Answer 24: Over the course of my career I have been involved with approximately thirty (30) appeals. Presently I am involved in three (3) appeals.

**PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS****25. Public Offices Held and Dates**

Public Office	Dates
None	

<b>26. Activities in professional organizations, including offices, held, for last 10 years</b>		
Professional Organization	Position Held	Dates
New Mexico Bar Association		Since 1982
Lawyer Referral for the Elderly		Cannot recall
New Mexico Medical Review Commission.		Since 1990
Rules Committee		2015
Volunteer Attorney Pool		Cannot recall, currently involved.
Albuquerque Bar Association		1982 – 2016
Defense Lawyers Association	None	Inception to Present
American Board of Trial Advocates	None	2010 to Present
<b>27. Activities in civic organizations, including offices, held, for last 10 years</b>		
Civic Organization	Position Held	Dates
None for the last 10 years. Before that timeframe I was involved in many Civic Organizations. I was unable to continue in these activities due to increased responsibilities in firm management, client and employee supervision to our clients and employees.		
State Fair Commission		1997 – 2003
President and Board Member of Albuquerque Boys and Girls Club.		1986 – 1990
Original Member of Albuquerque Bernalillo County EMS Authority.		1990's
President and Board Member of North Valley Little League.		1993 - 1996

Board Member of Albuquerque United Football Club.		2002 – 2007
Board Member of Queen of Heaven School.		1998 – 1999
Board Member of St Charles Borromeo Elementary School.		2000 - 2002

**28. Avocational interests and hobbies**

Answer 28: Fly fishing, Exercise and Golf.

**29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.**

Answer 29: [REDACTED]

**30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify**

Answer 30: [REDACTED]

**31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.**

Answer 31: [REDACTED]

**32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?**

Answer 32: [REDACTED]

**33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?**

Answer 33: [REDACTED]

**34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).**

Answer 34: Yes, I was named once or twice in lawsuits as a State Fair Commissioner. These were solely in my capacity as Commissioner and not for any personal conduct. I was also named in an employment lawsuit by a former associate. The terms of that settlement are confidential. However, before the matter was resolved there was a jury trial in which the jury ruled in my favor and in favor of other partners after 15 minutes of deliberation.

**35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?**

Answer 35: No.

**36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?**

Answer 36: Not Applicable.

**37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?**

Answer 37: Not Applicable.

**38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.**

Answer 38: Yes.

**39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.**

Answer 39: No.

**40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:**

Answer 40: I am a member of HAST, LLC and JCI Investments. These are two (2) groups that were formed and have a small ownership interest in the building we currently lease. I am not an officer in the LLC and have no role in management of the building.

**41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.**

Answer 41: The only conflicts that might arise regularly are those involving former clients. As an insurance defense attorney who has practiced for thirty-five (35) years in New Mexico, I have done work for a number of insurance companies and clients. It will be necessary for me to be careful in this regard.

**42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.**

Answer 42: Yes.

**43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.**

Answer 43: I would like to be appointed to the New Mexico Court of Appeals to allow me to utilize my experience as a business owner, mentor and trial lawyer to focus on analyzing and evaluating appealed cases. I have reached the point in my career where I would like to spend more time evaluating new and complicated legal issues that come before the Court, rather than investigating and developing cases for resolution or trial. I have always enjoyed analyzing my cases, evaluating and deciding how the law might impact a case I am handling for a client. I would enjoy being in a position to spend more time engaged in this type of analysis, and to be able to participate with others in authoring opinions after analysis.

After handling up to 150 cases at a time during my career over the last 35 years, as well as mentoring countless numbers of associates and junior partners concerning a wide variety of legal issues and

problems, the knowledge and experience I have gained through those experiences can be better utilized as a Judge on the Court of Appeals. Being able to spend time analyzing the variety of cases that are presented to the Appellate Courts would allow me to further develop my legal knowledge and allow me to expand the way I approach and evaluate the law. After handling all types of matters for all types of clients, and carefully spending time listening to clients, colleagues, judges and adversaries, I am better able to listen to litigants, attorneys and other Judges on the Court as well as analyze past decisions to reach a conclusion. In my opinion it takes the experience I have had over the last 35 years to realize and understand the best attorneys and Judges are those who allow themselves to reexamine and reconsider their decisions when others have a different point of view. I believe those who have written letters of support and those who have been listed as references would tell you if asked I have always been willing to listen and reexamine my point of view concerning the law in the case, even when I have a strong point of view, and I have been known to admit I was incorrect after carefully listening to the viewpoint of others.

**44. Does submission of this application express your willingness to accept judicial appointment to the New Mexico Court of Appeals if your name is chosen by the Governor?**

Answer 44: Yes

**Items to be Submitted in Separate Document(s)**

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the

letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

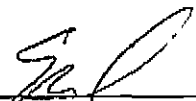


[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

### AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/:

  
Edward W. Shepherd

Date:

8/16/17

**EMPLOYEE LIST****\* CURRENT EMPLOYEES**

Anderson, Nathan

Baker, Robyn

Bleck, Brian

Byund, Jared

Cardwell, Amy

\*Collins, Joshua

Dempsey, Dustin

Dunlap, Sebastian

Drennan, Lindsay

Edmonds, Joseph

Elmore, Christopher

Elms, Jonathon

Gallardo, Julie

Garrison, Jacob

Gonzales, David

Hatch, Jesse

Hatch, Loren

Hatch, Richard

Hodge, Loni

Holt, Corrine

Johnson, Randi

Jones, Jenny

Keating, Tami

\*Ketai, David

\*Lillywhite, Brant

Lynch, Brande

Martinez, Orlando

\*McDowell, Cory

Melendres, Christopher

\*Owens, Tiffany

Pascetti, Rachel

Pinon, Aaron

Ritchie Jeremiah

Salazar, Jennifer

Sanchez, Anita

Romero, Joseph

Sandrs, Ryan

\*Schumacher, Courtney

\*Segura, Greg

Singer, Jessica

Tate, Adam

\*Vega, Laura

Withem, Jack

Wyman, Thomas

**IN THE COURT OF APPEALS  
OF THE STATE OF NEW MEXICO**

**CHRISTUS ST. VINCENT REGIONAL  
MEDICAL CENTER,**

**Third-Party Plaintiff-Appellee,**

**v.**

**COA No. 30,343  
District Court No. CV-2007-03046**

**RAMON DUARTE-AFARA, M.D., and  
MARK WADE DICKINSON, M.D.**

**Third-Party Defendants-Appellants.**

**Appeal from the First Judicial District Court  
County of Santa Fe, State of New Mexico  
Honorable Barbara Vigil, Trial Judge**

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**BRIEF IN CHIEF**

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**[Oral Argument Requested]**

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& CHAPMAN, P.A.**  
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-and-

**BUTT, THORNTON, & BAEHR, P.C.**

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*[Citations to the digital recording of the transcript of the 12/11/09 hearing are by elapsed time from the start of the recording (e.g. "Tr. 10:25" indicates a point occurring ten minutes and twenty-five seconds after the start of the recording)]*

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## **II. SUMMARY OF PROCEEDINGS**

### **A. Nature of the Case, Course of Proceedings and Disposition Below**

This action arose from alleged medical malpractice that occurred on December 9-10, 2004 after Plaintiff Lillian Martinez underwent a hysterectomy at Christus St. Vincent Regional Medical Center ("St. Vincent"). RP 1, 34, 110. Plaintiffs alleged that St. Vincent Hospital failed to properly evaluate, diagnose, and treat Ms. Martinez following her surgery, and that such failure caused injury to Ms. Martinez. RP 1 at ¶¶ 9-10.

Plaintiffs filed their original Complaint against St. Vincent on December 4, 2007, just before the deadline ran on the three-year limitation period for suits filed under the Medical Malpractice Act, NMSA 1978, Section 41-5-13. RP 1. Neither Dr. Duarte-Afara nor Dr. Dickinson was named as a defendant in Plaintiffs' original Complaint. RP 1. On March 12, 2008, Plaintiffs filed their First Amended Complaint for Medical Negligence, alleging negligence against both Dr. Duarte-Afara and Dr. Dickinson in their treatment of Ms. Martinez during the post-operative period following her hysterectomy on December 10, 2004. RP 34, 110.

Dr. Duarte-Afara and Dr. Dickinson ("Appellants") are and were qualified health care providers pursuant to the Medical Malpractice Act ("MMA"). RP 34 at ¶ 10. Appellants therefore qualified for the benefits of the MMA, including the three-year statute of repose provision for instigating an action against them thereunder. *See*

§ 41-5-13. Because Plaintiffs' Amended Complaint naming Appellants was not filed until after the three-year statute of repose period had expired, Appellants filed respective Motions for Summary Judgment on Plaintiffs' claims against them, asserting that Plaintiffs' claims were barred by the statute of repose. RP 134, 232, 222. On October 2, 2008, after considering Appellants' statute of repose argument, ruling that St. Vincent was vicariously liable for any actions or inactions of Appellants, and considering Plaintiffs' stipulation of dismissal as to Appellants, the District Court entered an order dismissing with prejudice Plaintiffs' claims against Appellants. RP 490.

On December 22, 2008, St. Vincent filed a third-party complaint for indemnification against Appellant Dr. Duarte-Afara based upon his medical care of Lillian Martinez on December 9-10, 2004. RP 589. On March 19, 2009, St. Vincent amended its Third-Party Complaint to include a claim for indemnification against Appellant Dr. Dickinson based upon his medical care of Lillian Martinez on December 9-10, 2004. RP 950. St. Vincent alleged that, in the event that Appellants are found negligent in their care of Ms. Martinez, St. Vincent is permitted to obtain equitable indemnification from them in the amount for which St. Vincent is found vicariously liable. RP 950 at ¶ 18. Dr. Duarte-Afara, joined by Dr. Dickinson, filed a Motion to Dismiss St. Vincent's indemnity claim against them, arguing that the three-year limitations period contained in the MMA acts as a statute of repose,

barring such claims against them. RP 1178, 1114. In its Response, St. Vincent argued that the three-year statute of repose set forth in the MMA did not apply to its indemnification claims against Appellants, but, rather, its claim was governed by the four-year limitation period in Section 37-1-4 (four-year statute of limitations applicable to “all other actions not otherwise provided for”). RP 1258. In a hearing on Appellants’ Motion to Dismiss St. Vincent’s Third-Party Complaint for Indemnification, the District Court agreed with Appellants, granted their Motion to Dismiss, and held that St. Vincent’s indemnification and contribution claim against Appellants was barred by the three-year statute of repose set forth in the MMA. Audio Transcript of Dec. 11, 2009 Hearing (hereinafter “12/11/09 Tr.”), at 9:54:46 – 9:55:58.

Following a hearing on St. Vincent’s Motion to Reconsider, (*see* written transcript of Feb. 18, 2010 hearing), the District Court reversed its decision, granted St. Vincent’s Motion to Reconsider, and denied Appellants’ Motion to Dismiss. RP 2219. In its Order, the District Court indicated that St. Vincent’s action against Appellants was governed by the four-year statute of limitations in Section 37-1-4 rather than the three-year statute of repose set forth in Section 41-5-13 of the MMA; therefore, St. Vincent’s cause of action against Appellants accrues at the time of payment of the underlying claim, judgment, or settlement rather than at the time when the alleged underlying damage occurred to Plaintiffs. RP 2219. In the same

Order, the District Court granted permission under Section 39-3-4(A) for Appellants to request an interlocutory appeal on the issues presented in the Motion. RP 2219.

**B. Summary of Relevant Facts**

Because the relevant facts are all procedural, they have been heretofore summarized in the preceding “Nature of the Case, Course of Proceedings and Disposition Below” section of this Brief.

**III. STANDARD OF REVIEW**

An appellate court reviews de novo a district court's application of the law to the evidence in arriving at its legal conclusions. *Leach v. N.M. Junior College*, 2002-NMCA-039, ¶ 9, 132 N.M. 106, 45 P.3d 46. Thus, the appellate court “analyze[s] the legal issues without any presumption in favor of the judgment of the court below.” *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 8, 145 N.M. 186, 195 P.3d 353. Issues of statutory construction and interpretation are questions of law, which an appellate court reviews de novo. *N.M. Banquest Investors Corp. v. Peters Corp.*, 2007-NMCA-065, ¶ 43, 141 N.M. 632, 159 P.3d 1117 (citation omitted).

The issue here on appeal is a pure question of law involving statutory construction and interpretation; specifically, whether the three-year statute of repose set forth in Section 41-5-13 of the MMA applies to indemnification actions

where the underlying action is one for medical malpractice. Thus, the appropriate standard of review is de novo.

#### IV. ARGUMENT

The controlling question of law at issue turns on the Court's interpretation of the statute of repose set forth in Section 41-5-13 of the Medical Malpractice Act, and its applicability to actions for indemnification where the underlying action is one for medical malpractice under the MMA. The Court below held that St. Vincent's indemnification action is separate and distinct from the underlying medical malpractice action and therefore has a separate statute of limitations, and a separate accrual date. RP 2219. This argument ignores the important distinction between a statute of limitations and a statute of repose, as well as the legislative determination that qualified medical providers under the MMA should be shielded from all liability after three years from the date of the alleged malpractice.

- A. Because Appellants accepted the burdens of qualification, they are entitled to the benefits of the Medical Malpractice Act, which includes a three-year time limitation for actions based on medical malpractice.**

Allowing St. Vincent's claims to go forward would strip Appellants of a benefit to which they are entitled under the Medical Malpractice Act because they accepted the burden of becoming qualified healthcare providers, thus undermining the purpose of the Act. In 1976, in response to a perceived medical malpractice insurance crisis, the legislature passed the Medical Malpractice Act. *Roberts v.*

*Southwest Community Health Servs.*, 114 N.M. 248, 249-50, 837 P.2d 442 (1992). The stated purpose of the MMA is to “promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.” *Id.* at 251 (citing § 41-5-2). To achieve this goal, the legislature offered health care providers “benefits” such as malpractice liability coverage, Section 41-5-25; limitations of malpractice awards, Section 41-5-6; limitations of personal liability of health care providers for future medical expenses, Section 41-5-7; and a mandatory procedure for reviewing medical malpractice claims before such claims can be brought in a district court, Sections 41-5-14 to -21. *Id.* at 252. The legislature, however, conditioned a health care provider’s entitlement to these “benefits” on meeting the qualifications of the Act. *Id.* (citing § 41-5-5(A)).

The bureaucratic burdens of complying with the statutory scheme are significant and can be costly. *Cummings v. X-ray Assoc.*, 1996-NMSC-035, ¶ 27, 121 N.M. 821, 918 P.2d 1321. The burdens include proof of insurance coverage of \$200,000 per occurrence and payment of an annual surcharge in order to maintain the patient’s compensation fund. *Id.* (citing §§ 41-5-5(A)(1), 41-5-5(A)(2)). By establishing minimum levels of insurance and levying a surcharge to sustain the patient’s compensation fund, the Medical Malpractice Act achieves the legislative purpose of assuring that health care providers are adequately insured so that

patients may be reasonably compensated for their malpractice injuries. *Id.* (citation omitted).

Thus, the legislature encouraged health care providers to become qualified by accepting the burdens of qualification, and offered certain benefits in return. *Roberts*, 114 N.M. at 252. Section 41-5-5(C) of the Act specifically limits its benefits to those health care providers who accept the burdens of qualification. *Id.* at 250. Dr. Duarte-Afara and Dr. Dickinson accepted the burdens of qualification, and were and are qualified providers pursuant to the Act. RP 34 at ¶ 10.

Section 41-5-13, has been characterized as a “benefit” of the Act because it bars any medical malpractice claims against qualified health care providers arising three years after the act of malpractice, whether or not such claims are discoverable. *Roberts*, 114 N.M. at 252. Section 41-5-13 states:

No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act [Chapter 41, Article 5 NMSA 1978] may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred except that a minor under the full age of six years shall have until his ninth birthday in which to file. This subsection [section] applies to all persons regardless of minority or other legal disability.

§ 41-5-13. The plain meaning of this statute has been held to demonstrate that the legislature intended the occurrence rule to govern the Medical Malpractice Act. *Cummings*, 1996-NMSC-035, ¶ 47. That is, the plain language of Section 41-5-13 establishes the date of the act of malpractice as the only relevant factor, without

any reference to any subsequent harm. *Id.* ¶ 52. In this sense, Section 41-5-13 operates as a statute of repose rather than as a statute of limitations. *Id.* ¶ 47. Whereas a statute of limitations establishes the time, after a cause of action arises, within which a claim must be filed, a "statute of repose terminates the right to *any action* after a specific time has elapsed, even though no injury has yet manifested itself." *Id.* ¶¶ 48, 49 (emphasis added). In enacting Section 41-5-13, the legislature determined that three years is an appropriate termination point for claims against qualified health care providers.

That the three-year time bar to medical malpractice actions against qualified providers may have harsh results has been acknowledged by the New Mexico Supreme Court as an intentional consequence of the Act. *Id.* ¶ 58. In *Cummings*, the Court found that by failing to pursue a malpractice claim upon discovery of her injury during the three year period, Cummings lost her cause of action. *Id.* Cummings argued that the Medical Malpractice Act could not be so harsh that the limitations period could run on a potential malpractice claim before the claim even came into existence. *Id.* The court found, however, that "it is irrelevant that the patient loses his or her malpractice claim through 'blameless ignorance.'" *Id.* (citation omitted). "Courts often point out that it is not their responsibility to inquire into the harshness of a legislative enactment, the strategy behind a legislative policy, or even the wisdom of a legislative solution to a particular



problem.” *Id.* Hence, the *Cummings* Court held Cummings’ medical malpractice claim time-barred by Section 41-5-13. *Id.* Here, because Appellants took upon themselves the obligations associated with becoming qualified providers under the Act, they should be afforded the benefits and protections of that Act, even when its application may result in St. Vincent losing its claim.

**B. St. Vincent’s indemnification claim is subject to the three-year statute of repose set forth in Section 41-5-13 of the Medical Malpractice Act because it is a claim based on alleged acts of malpractice.**

The New Mexico Supreme Court has stated that, in enacting the MMA, “the legislature intended to cover *all causes of action* arising in New Mexico that are *based on acts of malpractice*.” *Wilschinsky v. Medina*, 108 N.M. 511, 517, 775 P.2d 713 (1989) (emphasis added). In addition, the legislature has determined that a malpractice claim “includes *any cause of action* arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care . . .” § 41-5-3(C) (emphasis added). Here, St. Vincent’s claim is undoubtedly based on acts of malpractice, as St. Vincent stands to recover only if Appellants are found to have committed medical malpractice. St. Vincent’s Third-Party Complaint is based on vicarious liability and necessarily founded upon Appellants’ alleged malpractice in treating Lillian Martinez.

That St. Vincent's claim against Appellants arises from and is based on medical malpractice is easily apparent when one considers what will happen when St. Vincent's claim goes to the jury. The jury will be instructed that, in order for St. Vincent to recover contribution or indemnity against Appellants, St. Vincent must prove that Appellants failed to apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified doctors practicing under similar circumstances. *See* Rule 13-1101 UJI. In other words, St. Vincent will have to prove a medical malpractice claim against Appellants.

If the statute of repose provision of the MMA does not apply to indemnification claims based upon alleged medical malpractice, then the provision limiting the amount recoverable from a qualified provider, as well as other aspects of the MMA, must also be called into question when a qualified provider is sued for indemnification or contribution. *See* § 41-5-6. The result is an unintended back door that will allow hospitals and other entities providing medical services to avoid the strictures of the MMA when suing qualified providers for indemnification or contribution based on alleged acts of medical malpractice. If third-party actions are permitted to eviscerate the statute of repose benefit to qualified providers under the MMA, the legislative purpose is thwarted.

In its Response to Appellants' Motion to Dismiss St. Vincent's third-party claim (RP 1258), and at the December 11, 2009 hearing on that Motion (12/11/09

Tr. at 9:46:55), St. Vincent relied heavily on *Budget Rent-A-Car Sys., Inc. v. Bridgestone Firestone N. Am. Tire, LLC*, 2009-NMCA-013, 145 N.M. 623, 203 P.3d 154. The *Budget* Court held that a claim for indemnity accrues at the time of payment of the underlying claim, payment of a judgment, or payment of a settlement by the party seeking indemnity. *Id.* at ¶ 21. For purposes of this Appeal, *Budget* is inapposite. In that case, the Court was dealing with a statute of *limitations* as opposed to a statute of repose, and the claim at issue was not one for medical malpractice. The underlying claim in *Budget* was one for product defect—a claim not subject to a separate statute of repose imposed by the legislature to limit the liability of product manufacturers. If there existed a similar statute of repose that barred all claims against product manufacturers arising from or based on product defect after a certain date, whether or not such claims were discoverable, *Budget* would have some relevance to this case. With medical malpractice, the legislature has spoken on the issue, and enacted Section 41-5-13 in order to shield qualified providers such as Appellants from liability after three years from the date of the alleged malpractice. Accordingly, *Budget Rent-A-Car* is not applicable.

That St. Vincent's claim for indemnification is a claim based on medical malpractice and therefore subject to the MMA is not a novel concept. *See Davis v. Acton*, 373 So. 2d 952 (Fla. Dist. Ct. App. 1979). In *Davis*, a doctor was sued by

the estate of a patient for wrongful death and damages based upon medical malpractice. *See Id.* at 952. The doctor filed a third-party complaint for indemnification against a consulting physician. *Id.* The trial court dismissed the third-party indemnification claim on the basis that the claim was not first submitted to medical mediation pursuant to Florida's medical malpractice act. *Id.* The Florida District Court of Appeals affirmed the dismissal, holding: "It is to be emphasized that the gravamen of the third-party action is predicated upon the alleged professional negligence by a practicing physician, and appellant's claims for indemnity and contribution arise out of that underlying claim of professional negligence." *Id.* at 953. Likewise, the gravamen of St. Vincent's third-party action is predicated upon the alleged professional negligence of Drs. Duarte-Afara and Dickinson, both qualified providers under the MMA. As in *Davis*, St. Vincent's claims for indemnity and contribution arise out of the underlying claim of professional negligence. As such, St. Vincent's claim falls within the purview of the MMA and is time barred by the three-year statute of repose.

**C. St. Vincent's claim for indemnification, which is based on a claim of medical malpractice, is time-barred because it was filed beyond the three-year statute of repose set forth in the Medical Malpractice Act.**

The date of Appellants' alleged malpractice was December 9-10, 2004. RP 34, 110, 245 at 1. Any claim based upon medical malpractice against Dr. Duarte-

Afara or Dr. Dickinson, as qualified providers, must thus have been filed by December 10, 2007, pursuant to the limitation imposed by Section 41-5-13. St. Vincent's Third-Party Complaint against Dr. Duarte-Afara was filed on December 22, 2008 (RP 589), and its Amended Third-Party Complaint adding Dr. Dickinson was filed March 19, 2009 (RP 950). Both filings occurred well outside of the December 10, 2007 deadline.

Plaintiffs' claims against Dr. Duarte-Afara and Dr. Dickinson were dismissed as time-barred by the three-year statute of repose because Plaintiffs failed to file suit against Appellants within three years from the time that Appellants allegedly committed malpractice. RP 490. Simply because its claim against Appellants has been brought by virtue of a third-party complaint should not give St. Vincent greater rights than those possessed by Plaintiffs, and allow it to thwart the legislative determination that qualified healthcare providers should be shielded from all liability after a period of three years from the time of alleged malpractice. Whether liability takes the form of a direct claim for medical malpractice by a party plaintiff, or an indirect claim by a hospital for indemnification based on alleged malpractice, the outcome should be the same. As qualified providers under the MMA, Dr. Duarte-Afara and Dr. Dickinson should be afforded the protections they signed up for by fulfilling the obligations to

become qualified under the Act, among which is a three-year bar on liability for claims arising from, or based on, alleged medical malpractice.

V. CONCLUSION

WHEREFORE, Appellants respectfully request this Court to reverse the lower Court's denial of their Motion to Dismiss St. Vincent's Third-Party Complaint against them, and grant such Motion, dismissing with prejudice St. Vincent's Third-Party Complaint against them.

As there are significant policy issues implicated in this Appeal, Appellants believe oral argument will be helpful to a resolution of the issues contained herein. Appellants therefore respectfully request that oral argument be permitted in this matter.

Respectfully submitted,

ALLEN, SHEPHERD, LEWIS, SYRA  
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By: \_\_\_\_\_  
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By: electronic approval received 6/22/10

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this 28<sup>th</sup> day of June, 2010.

---

E.W. Shepherd

Edward W. Shepherd

Application for Judicial Vacancy on the New Mexico Court of Appeals

**Items to be Submitted in Separate Document(s)**

1. I understand that five (5) letters of recommendation have been submitted directly to The Chair of the Judicial Selection Commission which includes letters from professional adversaries.

**2. References:**

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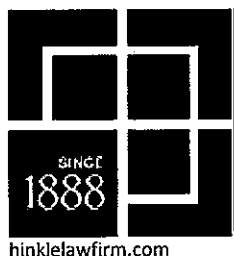


(h) Michael Hart  
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3. A legal writing sample is attached. The associate who assisted knew nothing about Medical Malpractice or the issues we were appealing. I provided an outline draft of the issues we were to present and the approach I desired. The associate did a rough draft and I then spent significant time working with the associate to produce a product which is now enclosed.

4. I have no other publications to attach that would be relevant to the Commission's consideration.

5. I have not currently or in the past suffered from any mental, physical or other conditions that would affect my ability to perform the essential duties of a judge, and which has not been disclosed above.



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REC'D AUG 14 REC'D

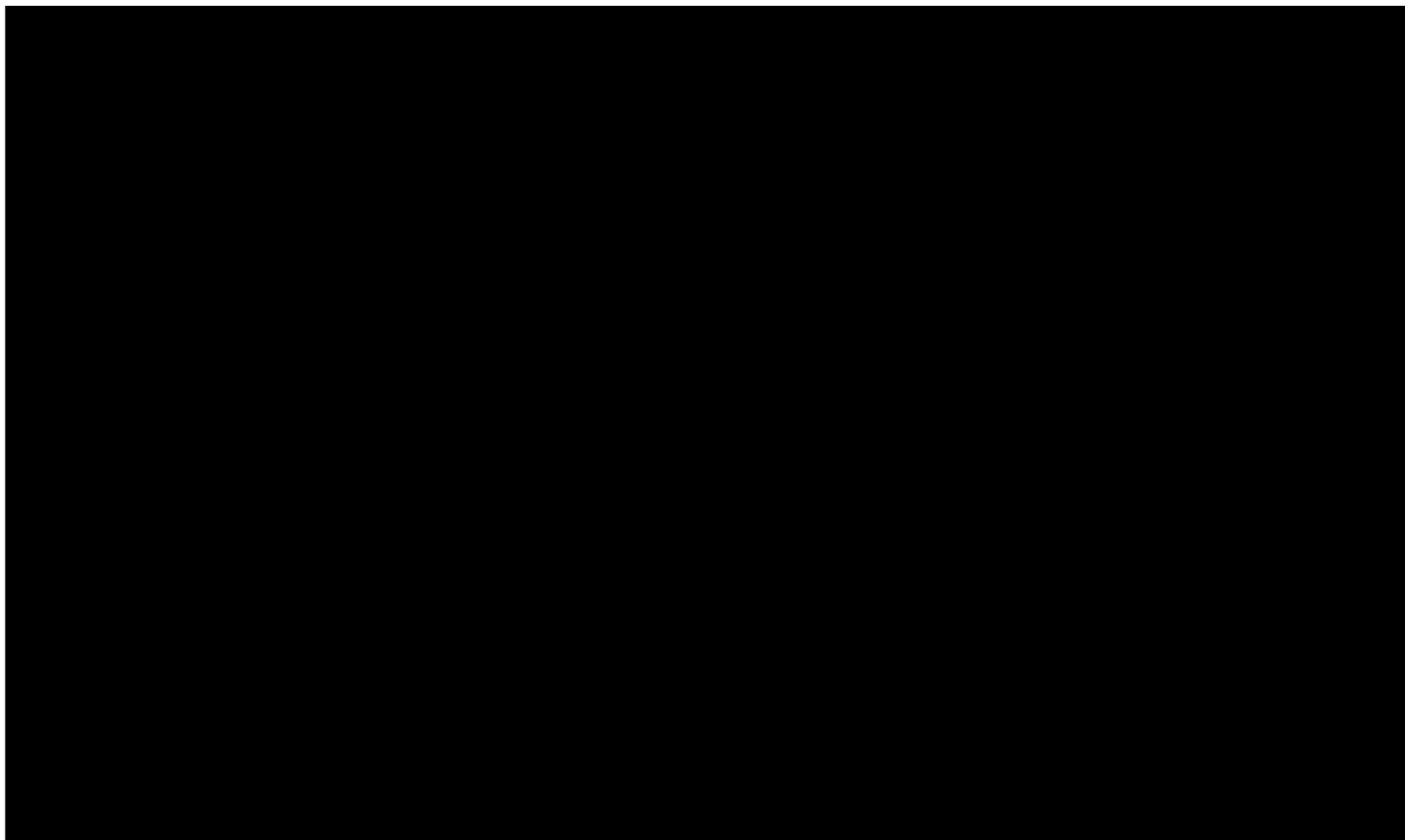
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August 10, 2017

**Via U.S. Mail & Facsimile**

Chair of Judicial Nominating Commission  
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To the Nominating Commission Chair:

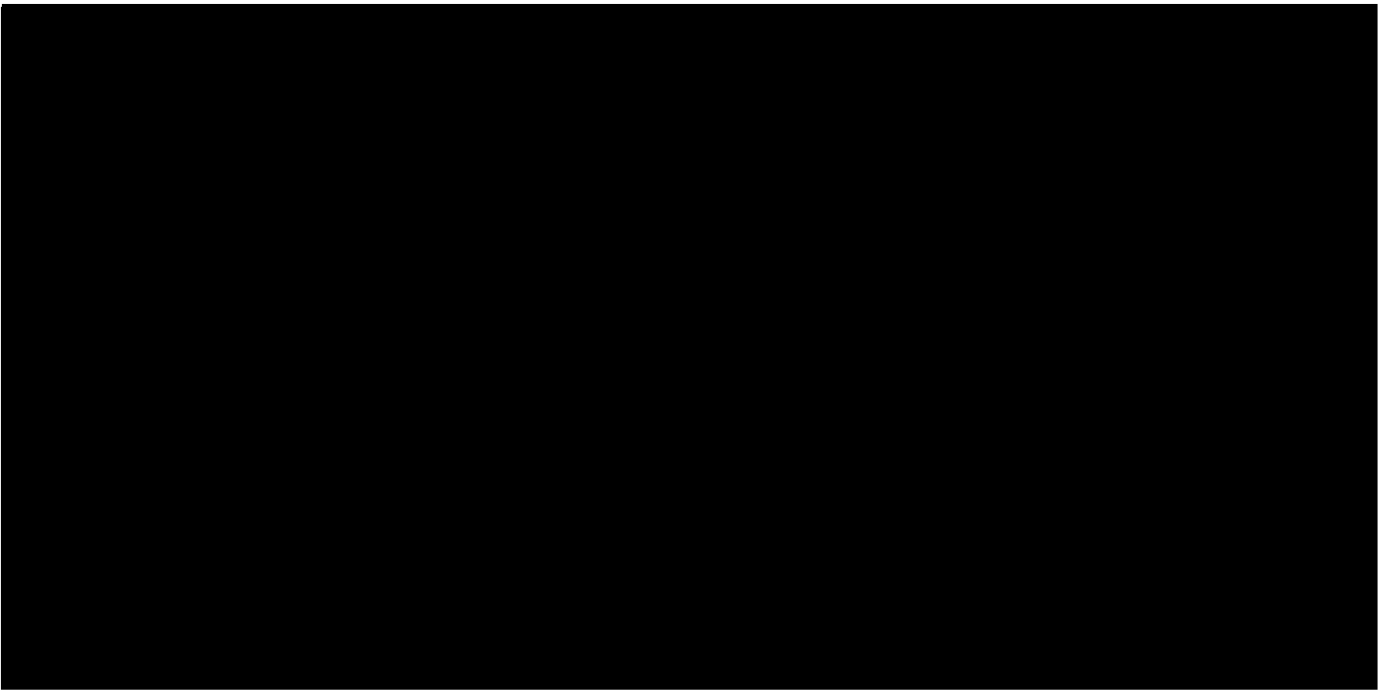


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August 9, 2017

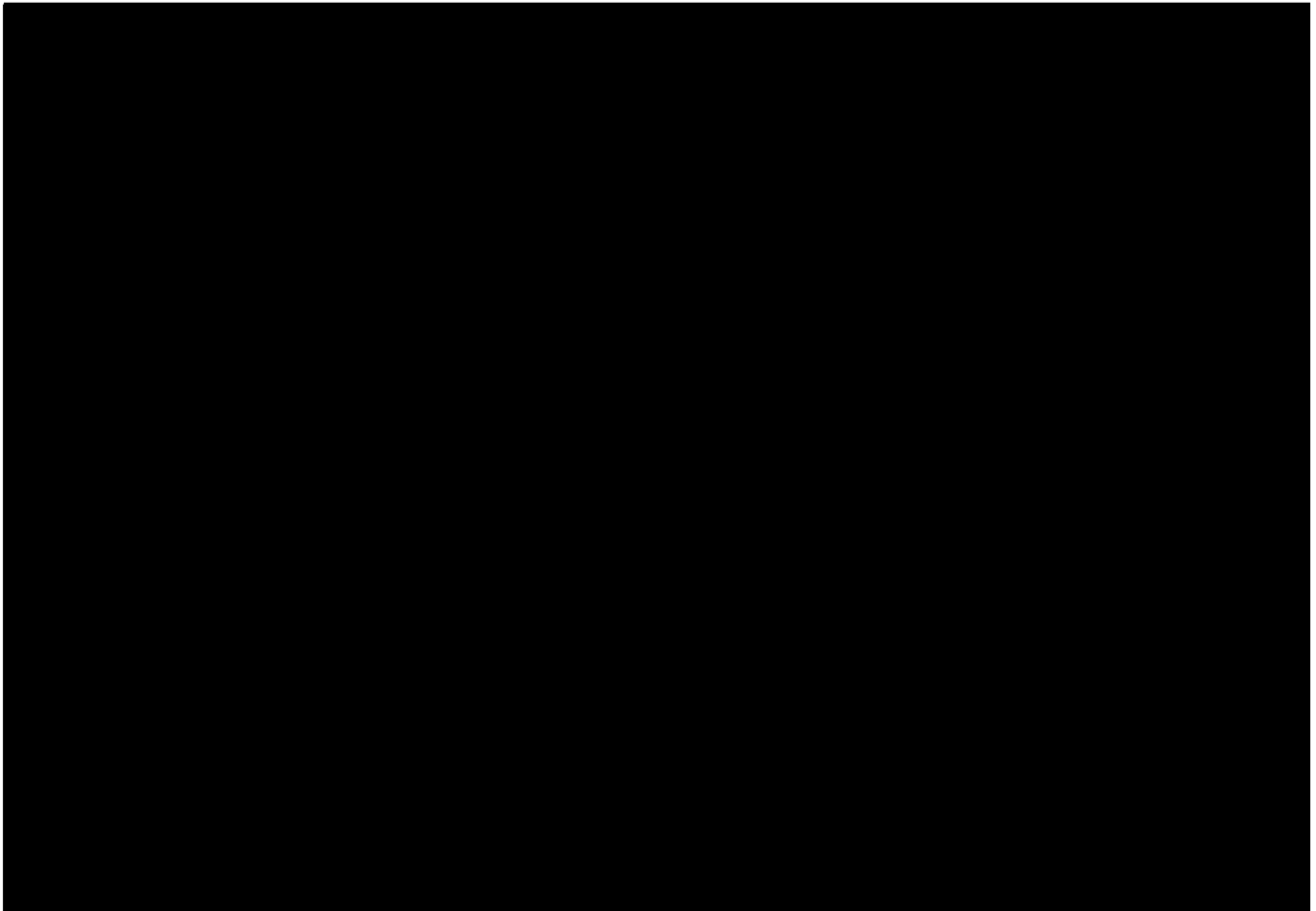
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Chair, Judicial Nominating Committee  
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REC'D AUG 09 REC'D

Re: New Mexico Court of Appeals Vacancy  
Edward W. Shepherd

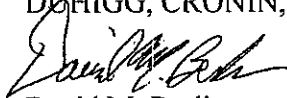
Dear Sir/Madam:



*Court of Appeals Vacancy*  
*Edward W. Shepherd*  
*August 9, 2017*  
*Page 2*

Very truly yours,

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A handwritten signature in cursive script, appearing to read "David M. Berlin".

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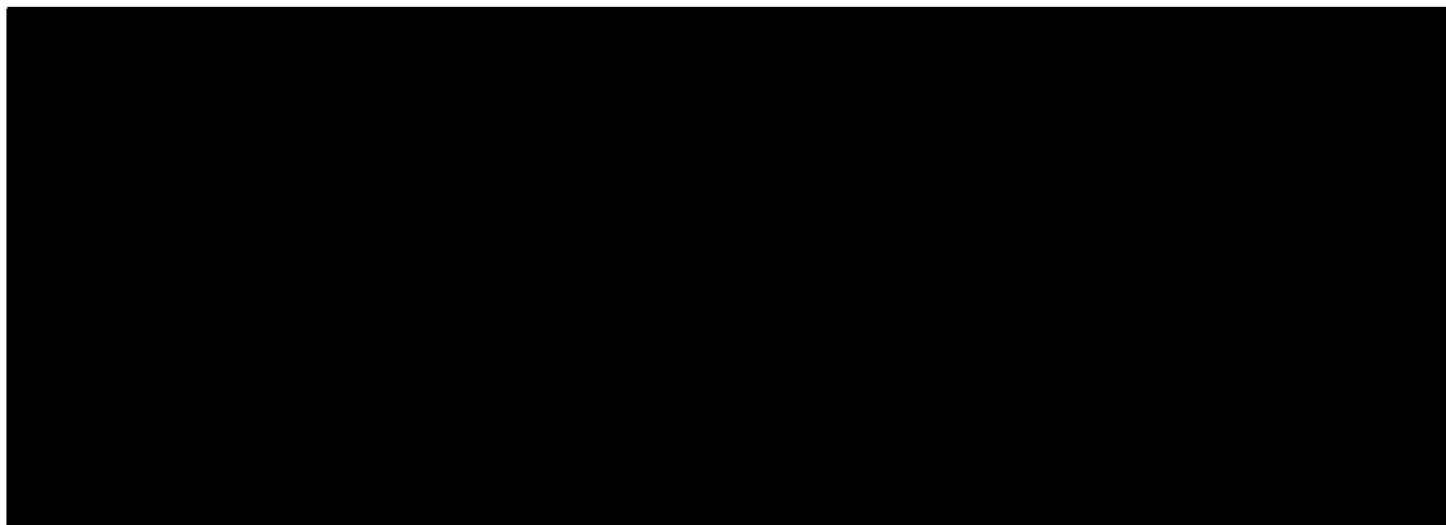
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Judicial Selection Commission  
**Attention: Chair**  
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**RE: Edward "Ned" W. Shepherd, Esq.**

Dear Chair:



Very truly yours,

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**Re: Edward W. Shepherd/Candidate for New Mexico Court of Appeals Vacancy**

Dear Dean Mathewson:

Very truly yours,

A handwritten signature in cursive script, appearing to read "Gerald G. Dixon", with a long horizontal flourish extending to the right.

Gerald G. Dixon

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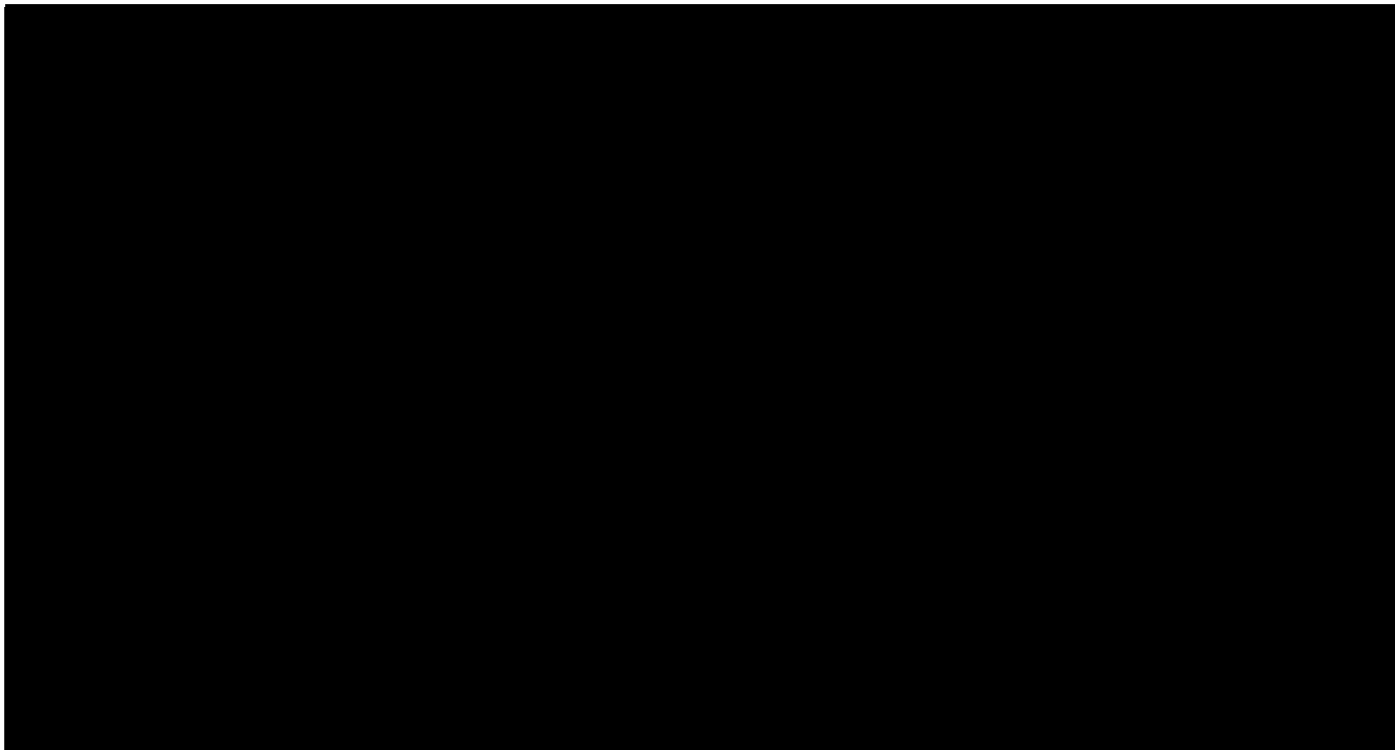
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Judicial Nominating Commission  
UNM School of Law

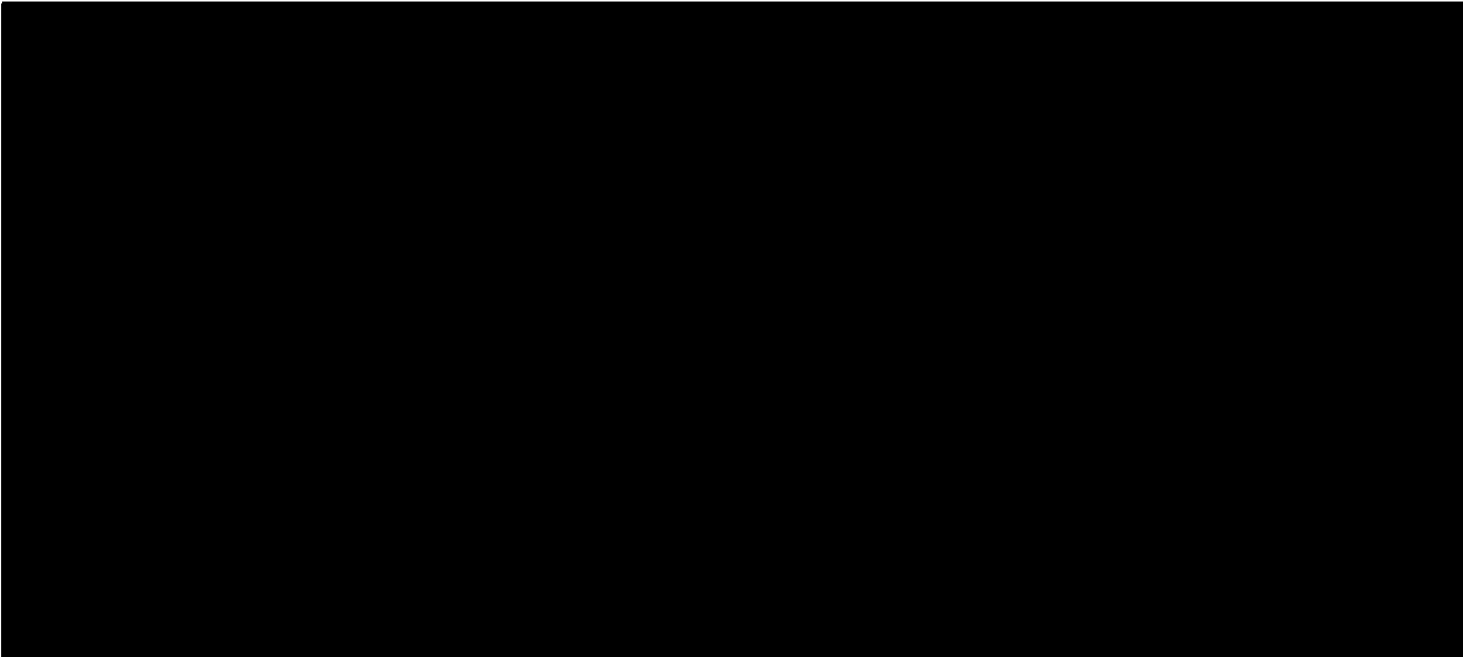
**Re: Edward W. (Ned) Shepherd  
Application for Vacancy, New Mexico Court of Appeals**

Attention: Chair:



RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

Judicial Nominating Commission  
August 15, 2017  
Page 2



Very truly yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

A handwritten signature in cursive script that reads "Rick Beitler".

By: \_\_\_\_\_  
Rick Beitler